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No. 926

In the Supreme Court of the United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the District of New Jersey

Civil Action No. 1100

HOBOKEN MANUFACTURERS' RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., INTERVENING DEFENDANTS

JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The defendants-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed.

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A. Statutory provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a [Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 41 (28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C., Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938].

U. S. C., Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 345 [Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938].

B. The statute of a State, or the statutes or treaty of the United States, the validity of which is involved

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented

The decree sought to be reviewed was entered on January 8, 1943. The petition for appeal was presented and allowed on March 8, 1943, together with an assignment of errors.

D. Nature of case and of rulings below

This is an appeal from a final decree of the District Court of the United States for the District of New Jersey, entered January 8, 1943, setting aside an order of the Interstate Commerce Commission dated July 24, 1939, in Docket No. 27630, *Hoboken Manufacturers Railroad Company v. Akron, Canton & Youngstown Ry. Co., et al.*, 234 I. C. C. 114, which dismissed the complaint of the Hoboken therein upon a finding that Hoboken's divisions out of joint class and commodity rail rates applicable on traffic interchanged by it with Seatrain Lines, Inc., are not unjust, unreasonably low, inequitable, or unduly prejudicial to Hoboken, and that the corresponding divisions received by the defendant rail lines are not unjust, unreasonably high, inequitable, or unduly preferential of them. The Commission's decision under review was made after extensive hearings concerning which the District Court said: "There is here no contention that the proceedings before the Commission were not fair and adequate in every way."

The petition in this case was filed by the Hoboken with said court on August 27, 1940, under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48 of Title 28, U. S. Code, against the United States of America, and pursuant to the provisions of 28 U. S. C., Section 45a, the Interstate Commerce Commission and a number of the Eastern trunk line railroads intervened as defendants.

Seatrain acquired control of complainant April 26, 1932, and owns all shares of complainant's capital stock, except 5 directors' qualifying shares. All of complainant's principal officers are officers of Seatrain, and six of complainant's seven directors are also directors of Seatrain. 234 I. C. C. 114, 115.

To provide it a terminal, and for the loading of cars into its vessels and for unloading them therefrom, Seatrain has and maintains a crane at the pier of the Hoboken where it docks.

On November 21, 1932, the Hoboken entered into an agreement to make certain payments to Seatrain on each ton of freight which it switched between its trunk line connections and Seatrain. (Exhibit C to the petition of complainant in the District Court.) Subsequently on December 31, 1936, the Hoboken filed its complaint with the Commission, and thereafter it entered into a new agreement with Seatrain Lines, Inc., dated February 24, 1937 (Appendix D to complainant's

petition before the District Court), in which it agreed to pay to Seatrain 73 cents per ton on all freight received from or delivered to its trunk line connections and delivered to or received from Seatrain which moved under the railroad's so-called "lighterage free" rates, by which is meant certain long-haul rates which apply to numerous stations grouped with New York City and which also cover deliveries to points within the lighterage-free limits of New York Harbor. When under such rates freight is to be delivered to or received from water lines serving New York Harbor, the rates cover such rail or rail and marine (lighter or float) service, and such loading or unloading of cars as may be necessary in the individual instance to deliver freight or receive it alongside ship within reach of ship's tackle.

Seatrain's car crane corresponds to the ordinary ship's cargo mast and sling, and is so regarded by it. Under the agreements of November 21, 1932, and February 24, 1937, Seatrain and the Hoboken agreed that cars should be interchanged between them at the cradle of the crane on the dock alongside Seatrain's vessels.

On traffic switched by the Hoboken between its connecting trunk lines and Seatrain which moves on non-lighterage-free rates (meaning those short-haul rates or rates on particular commodities which are not entitled to the lighterage-free privilege) the Hoboken under its agreement of February

24, 1937, makes no payments to Seatrain, although its physical service in respect thereof is identical with that which it performs on traffic moving under lighterage-free rates, as to which under said agreement the Hoboken pays Seatrain 73 cents per ton.

The Hoboken's divisions which it receives from the trunk lines have been and are adequate, reasonable, and equitable, unless the Hoboken is correct in its contention that it is entitled through an increase in its divisions to recoup from the trunk lines the payments which it makes to Seatrain in respect of freight moving on lighterage-free rates.

The Commission found that the payments which the Hoboken makes to Seatrain in respect of such traffic have no relation whatsoever to the performance of any transportation service which in the case of Seatrain traffic devolves upon the railroads under their lighterage-free rates.

The principal basis of the complaint filed in the District Court was that the Commission in determining the reasonableness of the divisions of the joint rates received by the Hoboken Manufacturers Railroad Company, did not include therein anything in respect of the payments which the Hoboken makes under its contract with Seatrain of February 24, 1937, effective March 1, 1937. The Commission determined that the patented devices of the Seatrain enabled that carrier

to engage in its own particular type of transportation as a common carrier by water, and that as the railroad's duty to deliver freight ended at the crane on the dock adjacent to the vessels of the Seatrain, and as the Hoboken itself performed all the service incident to making delivery of cars to, or to receiving them from, Seatrain, the payments which it made to Seatrain did not cover all or any part of the rail service actually performed within the scope of the railroad's obligations under their lighterage-free rates. The District Court sustained the holding of the Commission that transportation ended at the dock as being administrative in character, and, being supported by substantial evidence, it was binding upon the court.

The District Court recognized this rule of law as a matter of principle, but in practice acted contrary to it by substituting its own judgment for that of the Commission as to what elements and considerations could properly be considered as within the scope of the railroad's obligations under their lighterage-free rates to deliver freight to or receive it from Seatrain.

After sustaining the Commission's holding that transportation under the lighterage-free rates ended at the crane on the dock adjacent to the vessels of Seatrain, the court held that it was the duty of the Commission in determining reason-

able, equitable, nonprejudicial, and nonpreferential divisions to give consideration to the payments by Hoboken to Seatrain which were without relation to the transportation actually performed under such rates.

The court's decree returning the case to the Commission for further findings would require the Commission to take action beyond the scope of the issues in the case before it by prescribing divisions, virtually as between the railroads and Seatrain, of rail rates which did not involve Seatrain or its service, something that relates to a matter beyond the scope of the rates which the Commission was asked to divide.

The question presented by this appeal is a substantial one. It involves an interpretation and application of sections 1 (4) and 15 (6) of the Interstate Commerce Act in relation to the division of joint rates. Aside from the local situation immediately affected, the decision of the lower court, if allowed to stand, would establish principles relating to, and impinging upon, a valid exercise of the administrative process, which would have a far-reaching effect. Since the decision appears contrary to well-recognized principles of judicial review in such matters, it is important that the Supreme Court review this decision.

E. Cases sustaining the Supreme Court's jurisdiction of the appeal

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

United States v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454;

Florida v. *United States*, 282 U. S. 194;

Beaumont, Sour Lake & Western Railway Company v. *United States*, 282 U. S. 74;

Ann Arbor Railroad Company v. *United States*, 281 U. S. 658;

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1;

Interstate Commerce Commission v. *Union Pacific Ry. Co.*, 222 U. S. 541;

New England Divisions Case, 261 U. S. 184;

Alton R. Co. v. *United States*, 287 U. S. 229;

United States v. *Lowden*, 308 U. S. 225;

Hudson & Manhattan R. Co. v. *United States*, 313 U. S. 98; and

Interstate Commerce Commission v. *Railway Labor Executives Association*, 315 U. S. 373.

F. Opinion and decree of the District Court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and the final decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated March 8, 1943.

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In the United States District Court for the District of New Jersey

Civil Action No. 1100

HOBOKEN MANUFACTURERS' RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS

Before BIGGS, Circuit Judge, and FAKE and SMITH, District Judges. BIGGS, Circuit Judge.

The plaintiff, Hoboken Manufacturers' Railroad Company, in the case at bar seeks to set aside an order of the Interstate Commerce Commission, dated July 24, 1939, finding, after full hearing, that the divisions received by it out of joint class and commodity rates on traffic interchanged by it with Seatrain Lines, Inc., were not unjust or inequitable.

The plaintiff is a short switching railroad which runs along the water front of Hoboken, New Jersey. It connects with the Erie Railroad and through the Erie with other trunk line railroads. It exchanges freight and cars with those railroads. The Hoboken Railroad (to which we

will refer hereafter as "Hoboken") also serves industries and steamship piers along the Hoboken water front and, in particular, the pier of Seatrain Lines, Inc.

The defendant is the United States of America. The Interstate Commerce Commission was made a defendant, pursuant to the provisions of Sections 212 and 213 of the Judicial Code, as amended, 38 Stat. 220, 28 U. S. C. A. § 47 (a). Many of the eastern trunk line carriers intervened, and the argument for these carriers has been made by the Baltimore & Ohio Railroad Company.

This court has jurisdiction, pursuant to the provisions of the Acts of June 10, 1910 and October 22, 1913, the Commerce Act and the Urgent Deficiencies Act, as set forth in 38 Stat. 219, 28 U. S. C. A. § 41 (28) and 38 Stat. 219–220, 28 U. S. C. A. §§ 43–48 inclusive. The suit at bar was brought to review a decision and order of the Commission dismissing a complaint brought by Hoboken, to secure a determination by the Commission of the just, reasonable, and equitable divisions of the joint through rates on lighterage-free freight interchanged by Hoboken with Seatrain Lines, Inc.

Seatrain Lines, Inc. (hereinafter referred to as "Seatrain") operates three ships. These are fast fourdecked vessels, carrying standard gauge railroad tracks. Two of the vessels can carry one

hundred freight cars each and the third ninety-five cars. The vessels operate between Hoboken, New Jersey and Belle Chasse in Louisiana, via Havana, Cuba. When a Seatrain ship is put in position at its dock, it is next to a "cradle" which, by means of a large overhead crane, lifts the loaded freight car from the dock and carries it through one of a number of large hatches on the ship to one of the tracks within the vessel. The tracks of the cradle fit the tracks on ship, and the car is then pushed off the cradle to its place on the ship by a special little engine. There is one cradle for each track on each deck of the vessel and, when the loading of each deck is accomplished, the cradles are left in place flush with the deck, each cradle closing a hatch. In taking the car from ship to shore the process is reversed. By the use of the Seatrain method, goods and merchandise may be transported from shore to ship and from ship to shore without breaking bulk, and the necessity of loading and unloading the freight is eliminated.

This method of interchange is used between Seatrain and Hoboken. Approximately 40% of the cars interchanged by Hoboken with Seatrain move under lighterage-free rates, and about 60% under non-lighterage-free rates. With Seatrain freight regardless of how it is billed, whether as lighterage-free freight or non-lighterage-free freight, it is handled by Hoboken in precisely the same physical fashion.

When freight is shipped on lighterage-free rates, the carrier undertakes to deliver the freight at the foot of ship's tackle without any charge for lighterage.[1] The term lighterage is used to describe all those steps taken to deliver freight from a railroad car to a point where the ship's tackle may lift it to the ship. Lighterage, therefore, is the loading, unloading, and transfer of freight between a car and a ship's side. In the case at bar we are concerned only with the lighterage-free rate, and how it shall be divided between Hoboken and the trunk line carriers.

The Commission has established a through rate of $7.00 per ton, to shipside. On break-bulk lighterage-free freight the trunk lines receive for their share $5.65, and Hoboken receives $1.35. Of this $1.35, 60¢ goes to Hoboken as compensation for switching charges and 75¢ goes to it as reimbursement for the cost of loading, unloading, and transferring freight between the freight cars and shipside. On Seatrain freight, using that phrase to describe freight contained in cars lifted on the cradle to or from the Seatrain ship and in which the bulk is not broken, of the $7.00 through-rate to shipside, the trunk lines have refused to allot to Hoboken more than the sum of 60¢ for

[1] Lighterage has been defined as loading, unloading, or transportation by means of a lighter. The word came into use at a time when docking facilities frequently were insufficient to accommodate large ships which therefore stood out in the harbor. Merchandise was carried to them by smaller vessels or lighters.

its switching charges, retaining the 75¢, which was saved due to elimination of loading and unloading charges. Hoboken claims that upon Seatrain freight the trunk lines should receive $5.65 as their share and Hoboken should receive 60¢ for switching as usual, and 75¢ to reimburse it for payments made to Seatrain for the right to use the special Seatrain labor-saving and time-saving facilities. Hoboken contends that, while it may not be entitled to the full sum of 75¢ in this connection, it is entitled to some part of the 75¢ for the facilities which it has made available which permit shipping by sea without breaking bulk.[2]

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[2] We have used these break-down figures on the $7.00 through-rate because the parties really have argued their case upon this basis. There have been some slight changes in the break-down figures, but these are small. We think that if we employed the changed figures in this opinion confusion might result. We will refer to them briefly in this note.

The divisional allowance to Hoboken, prior to March 28, 1938, the effective date of the decision of the Commission in *Ex Parte 123, Fifteen Percent Case*, 1937–1938, 226 I. C. C. 41, was $1.35 per ton, which amount represented 60¢ for switching and 75¢ for loading or unloading the cars. The $1.35 division was increased under *Ex Parte 123*, either 5 or 10%, depending upon the commodities transported. See pages 37–39, testimony before the Commission, and Exhibit 2.

On car-load shipments loaded or unloaded by the shipper or consignee at their expense, the divisional allowance to Hoboken prior to *Ex Parte 123*, was 60¢ per ton, and subsequent to *Ex Parte 123*, either 63¢ or 66¢ per ton. See the same pages and the same Exhibit.

No loading or unloading of Seatrain freight being necessary to place or receive it at shipside, the trunk line railroads

The contentions of Hoboken must be examined in the light of the corporate relations existing between Seatrain and Hoboken. Prior to 1932, Seatrain had begun negotiations with Hoboken for the use of the terminal facilities. Seatrain then learned that Hoboken was insolvent and bought up all of its stock at auction. Seatrain now owns all of the 4000 shares with the exception of five qualifying directors' shares. Six of Hoboken's seven directors are also directors of Seatrain. Four of Hoboken's eight officers are officers of Seatrain.

Graham M. Brush, the president of Seatrain and of Hoboken, is the inventor of the Seatrain ship and of the appliances for loading and unloading freight cars into and out of such ships. He assigned his patents to Railway Transports, Inc., a corporation in which he is one of 700 shareholders. The extent of his control of this

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paid Hoboken on such freight a divisional allowance of 60¢ a ton prior to March 28, 1938, and 63¢ or 66¢ a ton after that date.

The 63¢ or 66¢ allowances (See Exhibit 36) represent an increase of 215 and 230 percent, respectively, over 20¢ per ton allowance in effect prior to July 1, 1918. If Hoboken's original divisional allowance of 20¢ had been increased in accordance with the general rate increases and reductions authorized by the Commission, its present allowances would be 38, 40, or 42 cents, varying as to commodities and territorial application of the rates. Prior to *Ex Parte 123* a compromise settlement was reached with the trunk line, establishing Hoboken's division at 60¢ per ton.

corporation was not disclosed. Railway Transports, Inc., gave Seatrain an exclusive license under the patents, for which Seatrain pays as royalty the sum of approximately $50,000 per annum. The patents expire in 1944.

Hoboken and Seatrain entered into a contract dated November 21, 1932 (subsequent to the purchase of Hoboken's stock by Seatrain, although negotiations had been commenced prior to the purchase), which provided, in respect to freight transported by Hoboken and consigned for delivery to Seatrain, that delivery should be considered to be completed by Hoboken when the cars had been placed upon the cradle. Under the contract Seatrain had the right, upon its request, to have Hoboken place the cars at some convenient point near the cradle, and Seatrain itself was then to place the cars on the cradle as Hoboken's agent. By other provisions of the contract Hoboken authorized Seatrain, as its agent, to take the cars from the cradle. The contract provided also that Hoboken would pay Seatrain 40¢ per ton of freight (other than coal) loaded into, or discharged from, the Seatrain ships in cars.

By a later contract between Hoboken and Seatrain, dated February 24, 1937, effective as of March 1, 1937, it was provided that Hoboken would pay Seatrain 73¢ per ton (subject to possible revisions because of increases or decreases

in the scale of longshoremen's wages) on all freight interchanged between them shipped on lighterage-free rates, and that Hoboken would pay Seatrain nothing on freight shipped on non-lighterage-free rates. Under this contract, Seatrain does not move the cars to or from the cradle. This service is performed by Hoboken.

The justification asserted by Hoboken for the sums paid by it to Seatrain is that, as the Seatrain appliances make it unnecessary to load or unload freight, the trunk line railroads are relieved of the expense of 75¢ per ton for which they ordinarily reimburse Hoboken when freight is moved under lighterage-free rates to or from water carriers other than Seatrain. Hoboken claims that since the trunk line carriers get these advantages by reason of Hoboken's contract with Seatrain, the savings effected should accrue to Hoboken and not to the trunk line carriers.

Under the contract of 1937, Seatrain charges Hoboken 73¢ for the Seatrain devices when used on lighterage-free freight. This would leave Hoboken 2¢ out of the 75¢ which Hoboken alleges it should receive under a new division of the $7.00 through-rate. If Hoboken's contentions were to prevail, it would be able to operate at a profit. Otherwise, Hoboken will operate (as it has in the past) at a loss. The Commission indicated, however, that if Hoboken had not made the 73¢ payment it would have operated at a profit, averaging the years 1936 and 1937.

Part of the Commission's report is devoted to a discussion of the various elements which compose Hoboken's necessary operating expenses and its income. Seatrain leases the Seatrain pier and slip from Hoboken. The rental is based on Hoboken's expenditures. These include rent, taxes, insurance, depreciation, repairs, maintenance and dredging, plus an estimated return of 6% on Hoboken's investment in the property. The crane which handles the cradles also is leased by Seatrain from Hoboken. Its original cost was about $85,000. The rental for all of the foregoing for the year beginning March 1, 1937, the effective date of the later contract was about $33,000.

It appears from the Commission's report that Hoboken paid Seatrain $110,000 in 1936, pursuant to the provisions of the 1932 contract; that in 1937 Hoboken paid Seatrain approximately $100,000. The cars that moved between Hoboken and Seatrain under lighterage-free rates were about 50% of all the cars moving between Seatrain and Hoboken. It follows that Hoboken paid Seatrain nothing for about 50% of the cars, viz, those that moved under non-lighterage-free rates.

The Commission concludes that the record before it warrants the finding that the former division of 60¢ and the present divisions of 63¢ and 66¢ a ton on lighterage-free freight are sufficient to cover the cost of the services performed by Hoboken and also constitutes a reasonable return on the property owned or used by Hoboken in

performing such service. The Commission goes on to say, and we think correctly, that the service that the railroads hold themselves out to perform under the lighterage-free rates includes the unloading of inbound cars and the placing of the lading within reach of the ship's tackle and a corresponding but reverse service in connection with outbound freight. Placing the cars upon the cradle or removing them therefrom satisfied all those requirements.

The Commission dismissed the complaint holding that the 75c. charge was not properly a transportation charge and that it could not be justified as a legitimate factor contributing to the efficiency of Hoboken's operation.

Hoboken has appealed to this court alleging that the order of the Commission was based upon errors in law in disregarding the contract between Hoboken and Seatrain, that the findings of the Commission are not supported by evidence, and that the order results in a confiscation of Hoboken's property without due process of law.

We have jurisdiction to review the order of the Commission. The Commission's determination upon matters of fact are binding, but the court

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That the Commission dismissed the complaint instead of entering a positive order is immaterial. The effect of the action is to establish the current practice as the approved division. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Alton R. Co.* v. *United States*, 287 U. S. 229; *B. & O. R. Co.* v. *United States*, 288 U. S. 349, 358.

may set aside the order if the parties were not accorded a fair and complete hearing, or if the findings of the Commission are not supported by evidence, or if the rate established by the Commission results in a deprivation of property without due process of law. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 22 U. S. 541, 547. *Florida East Coast Ry. Co.* v. *United States*, 234 U. S. 167; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 51.[1] There is here no contention that the proceedings before the Commission were not fair and adequate in every way.

Admittedly the Commission as the trier of fact must determine the point at which the transportation service of the railroad is complete and, if the Commission's finding in this respect is supported by substantial evidence, the parties and this court are bound upon it. The question of where transportation by rail ends is an administrative question: *Atchison Ry.* v. *United States*, 295 U. S. 193, 201; *United States* v. *American Sheet and Tin Plate Company*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156. Even though we might reach a different conclusion, if there is evidence to support the Commission's findings, its order

[1] But see the concurring opinion of Mr. Justice Brandeis asserting the finality of administrative findings notwithstanding questions of constitutionality. 298 U. S. 38, 73.

must be sustained. *New England Divisions Case,* 261 U. S. 184, 204; *Seaboard Airline Ry. Co.* v. *United States,* 254 U. S. 57, 62. The finding by the Commission that rail transportation ends at the cradle when Hoboken has put the car consigned for Seatrain upon it and begins at the cradle when the movement is reversed is fully supported by the evidence. The contract of November 21, 1932, between Hoboken and Seatrain expressly so provided, and the contract of February 24, 1937, now in force between Hoboken and Seatrain, makes no substantial change in this respect although Hoboken makes Seatrain its agent to put the cars upon and take them off the cradle. Since, as the Commission determined, transportation ends at the cradle, Hoboken completes its obligation under the lighterage-free tariff when it delivers the cars to the cradle. The Commission, therefore, held that the payments by Hoboken to Seatrain do not constitute a legitimate transportation cost. Upon this finding, supported by evidence, its judgment is final. *United States* v. *Pan American Petroleum Corporation,* 304 U. S. 156.

In its report the Commission found that, "While, therefore, the payments are not made for any service which the rail lines perform under the lighterage-free rate, there is a remaining question whether such payments may be justified, in any way and to any extent as compensa-

tion properly payable to Seatrain for the savings which it has accomplished for the rail lines by its new method of transfer. The new method of transfer puts the connecting rail lines to less expense under the lighterage-free rates than the old method. It may be argued, therefore, that they would be justified in making any payments that might be necessary for the purpose of inducing the establishment of the new method of transfer provided they were left with a net saving. There is no evidence, however, that payments were or are necessary for this purpose. The contract between Seatrain and complainant, to which defendant rail lines are not parties, is not evidence to this effect, in view of the control which Seatrain exercises over complainant. No such payments have, so far as the record shows, been exacted or obtained by Seatrain from an independent rail connection. There is ample reason to conclude, also, that the improved method of transfer is only an incident to the Seatrain plan of transportation, and that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections."

Admittedly, the contract between Seatrain and Hoboken should be examined carefully because of the corporate relationship. *Lindeheimer* v. *Illinois Telephone Co.*, 292 U. S. 151, 156; *Pittsburgh & W. V. Ry. Co.* v. *United States*, 41 F. (2nd)

806, 811. Also Seatrain does not exact payments from the railroads with which it interconnects at Havana and New Orleans. Hoboken asserts, however, that if Seatrain were to demand such payments from the United Railways of Havana, the latter's revenue from traffic with Seatrain would be less than that received from its traffic with break-bulk carriers. The location of the terminal at Belle Chasse saves Seatrain approximately 17 miles of travel in each direction and this, according to Hoboken, is sufficient to compensate for lack of contributory payments. The Commission did not determine the validity of the contract, but dismissed the entire question of the contract payments on the theory that Hoboken would receive the same intereonnecting facilities irrespective of the payments.

However, the issue at bar is not predicated solely upon Hoboken's legitimate costs. The entire inquiry should be directed to securing "a fair and equitable division" of the rates. Conceding *arguendo* that the contract between Hoboken and Seatrain does not constitute a valid obligation to be considered in determining Hoboken's costs, that does not necessarily mean that there is no obligation upon Hoboken to make some payment for the interconnection which saves Hoboken the labor and costs of loading and unloading freight. The Commission should have determined the *quantum meruit* of the relationship. It is pos-

sible that there was no service or relationship of value. Even such a finding would not necessarily result in a dismissal of the complaint. If there is a windfall in the case at bar by reason of Hoboken's right under its contract to use the Seatrain devices to fulfill its obligations of carriage, the Commission should determine that fact and also an equitable basis for division of the windfall between Hoboken and the trunk line carriers. This the Commission has failed to do by appropriate findings.

Whereas the burden of proof in attacking an established rate rests upon the complainant, *Interstate Commerce Commission v. Nashville C. & St. L. Ry. Co.*, 120 Fed. 934, the instant case was brought to determine a new division, since previous agreements did not cover the novel facts of the Seatrain method of interchange.

The agreement which Hoboken had had with the trunk line carriers since 1920 provides that the divisions shall be as follows:

	Per ton
Carloads loaded or unloaded by HMRR (Hoboken) or at its expense	$1.35
Carloads loaded or unloaded by shipper or consignee at their expense	.60

These rates are by their own terms inapplicable to the Seatrain method of interchange in which the loading and unloading is eliminated.

The act directs the Commission to inquire into the facts and to prescribe just and equitable divisions and not unjustly to prefer or prejudice any

party. There was no evidence presented to show that the granting of the entire saving of the loading or unloading of the cars was not an undue emolument for the trunk line railroads. The Commission's remark that the defendant's rates were based on average costs scarcely constitutes a finding as prescribed by the Act.[5] The Commission merely stated in conclusion that such divisions are not unduly preferential. While there is a lack of basic findings, the court need not examine the evidence and spell out conclusions of fact, *Florida* v. *United States*, 282 U. S. 194, 215. Likewise, where the evidence does not support the findings, the holding of the Commission should not be sustained. *Colorado* v. *United States*, 271 U. S. 153; *New England Divisions Case*, 261 U. S. 184, 204. Our holding on this point obviates the necessity for inquiring into the due process issue raised by the plaintiff.

If the Commission should find that the Seatrain devices are an efficient aid to railroad transportation, the Commission should evaluate the worth of the devices to Hoboken and a legitimate payment therefor; in short, including in the base upon which Hoboken's fair return is calculated, the true value of the Seatrain devices. In effect, the Commission, as a representative of the public interest

[5] Pursuant to *Ex Parte 123*, these divisions have been increased slightly. However, these figures were used by the parties, and, for convenience, we have followed their practice.

and the public would set the value of the contract and the Seatrain devices to Hoboken. It should likewise determine a division of the through rate which would not be unduly prejudicial or preferential to any of the parties.

The Order of the Commission of July 24, 1939, will be set aside and the Commission is directed to reinstate the proceedings before it and to make findings of fact as indicated by this opinion and to issue and enter a report in the proceedings and to make such an order or orders therein as may be required by law.

Findings of fact and conclusions of law are filed herein in accordance with the provisions of Rule 52.

JOHN BIGGS, JR.,
U. S. Circuit Judge.

GUY L. FAKE,
U. S. District Judge.

WILLIAM F. SMITH,
U. S. District Judge.

NOVEMBER 24TH, 1942.

In the District Court of the United States for the District of New Jersey

Civil Action No. 1100

HOBOKEN MANUFACTURERS' RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS

FINDINGS OF FACT

1. On December 31st, 1936, there was filed with the Interstate Commerce Commission a complaint, Docket No. 27630, *Hoboken Manufacturers' Railroad Company* v. *The Akron, Canton & Youngstown Railway Company et al.*, in which complainant, Hoboken Manufacturers' Railroad Company, alleged that the divisions it was receiving out of joint class and commodity rates on traffic interchanged by it with Seatrain Lines were unjust and unreasonable, in violation of the Interstate Commerce Act, and wherein it sought an increase in such divisions. The complaint prayed that the Commission, after full hearing, enter an

order requiring the Eastern Trunk Line defendants to cease and desist from violating the said Act. Numerous rail carriers in Central Freight Association, Trunk Line, and New England Territories, as well as various southern and southwestern railroads, were named as defendants in the Commission proceedings.

2. Extensive hearings were conducted by an examiner of the Commission, at which all interested parties appeared and introduced pertinent testimony. An examiner's proposed report issued, to which exceptions were filed by Hoboken, and a reply was filed by the rail defendants. The proceeding was also fully briefed and orally argued before the Interstate Commerce Commission.

3. Thereafter a report of the Commission, dated July 24, 1939, and reported in 234 I. C. C. 114, was served upon all interested parties, which report is referred to and made a part of the petition in this case as Exhibit B.

4. The plaintiff, Hoboken Manufacturers' Railroad Company (hereinafter referred to as Hoboken), a corporation organized and existing under the laws of the State of New Jersey, is a short switching line railroad operating along the water front of Hoboken, New Jersey, serving numerous steamship piers, including the piers of ordinary cargo or so-called break-bulk steamships and also the pier of Seatrain Lines, Inc. (hereinafter referred as to Seatrain). At its northern

end it has track connections with the Erie Railroad, by means of which it interchanges cars containing freight with the Erie Railroad and through it with other trunk-line railroads, including intervening trunk lines.

5. The intervening defendants (hereinafter referred to as the trunk lines) are railroad corporations existing under the laws of the various states and operating trunk lines of railroad between the New York water front and points in the Eastern part of the United States, and either individually or with other railroads with which they connect they perform railroad transportation of freight between New York Harbor, including Hoboken, and points of origin and destination in the Eastern Part of the United States. They publish and keep on file with the Interstate Commerce Commission tariffs naming rates for such railroad transportation to and from New York Harbor, including the Hoboken water front and steamship piers reached by the switching line of plaintiff.

6. The railroad freight rates to and from New York Harbor, including the Hoboken water front, are of two sorts:

(a) So-called local rates, under which as to carload freight the railroads' terminal obligation and undertaking to the shippers is merely to place cars at convenient points for loading or unloading, the operation of loading and unloading being performed by the shippers or at their expense.

(b) So-called shipside or lighterage-free rates, under which it is the obligation and undertaking of the railroads to the shippers to receive freight discharged from a ship on the pier or a lighter alongside the ship, furnish a car for the rail movement, move the freight to the car, and load the freight into the car, providing dunnage or bracing therefor when necessary; and in the case of freight moving in the reverse direction to switch or lighter the freight to the steamship pier, doing everything necessary to deliver the freight to the vessel in such a way as to obligate the vessel to receive and transport it; this, by custom in the case of the ordinary type of break-bulk ship, including unloading the freight from the car and handling the freight to shipside where it can be conveniently reached by whatever tackle is used to load the ship.

This suit involves only these so-called shipside or lighterage-free rates and the division of these rates between plaintiff and the trunk lines.

7. As a switching railroad Hoboken performs for the trunk lines the terminal services and obligations devolving upon them under these rates in connection with freight received from or to be delivered to steamships docking at piers served by Hoboken. The trunk-line railroads collect the freight charges on such freight in accordance with their tariffs and Hoboken receives its compensation for its terminal services in the shape of

so-called divisions or allowances paid to it by the trunk-line railroads out of the freight charges collected by the latter.

8. Since 1920 there has been an agreement between Hoboken and the trunk lines providing that Hoboken's divisions should be as follows:

	Per ton
Carloads loaded or unloaded by H. & M. R. R. (Hoboken) or at its expense	$1.35
Carloads loaded or unloaded by shipper or consignee or at their expense	.60

(These divisions have been slightly changed in connection with percentage increases in the rates themselves, but for convenience the parties used the foregoing and they are used herein.)

The division of 60¢ a ton represents Hoboken's division of so-called local rates described in (a) of paragraph 6 and the division of $1.35 represents its division of shipside or lighterage-free rates described in (b) of paragraph 6, where in interchanging with ships it loads the freight into or unloads it from cars at its expense.

The division of 60¢ reimburses Hoboken for the expense of switching or wheeling the cars. The division of $1.35 is made up of this 60¢, plus 75¢, the approximate or average cost to Hoboken of loading or unloading freight into or from cars and the handling incident thereto.

Ordinarily, Hoboken performs the unloading from and loading into cars and handling across steamship piers, not with labor hired directly by it but by making a contract with the steamship

company concerned to do the work with steamship stevedore labor, Hoboken paying the steamship company approximately 75¢ a ton.

9. The proceeding before the Commission related to the division to be received out of shipside or lighterage-free rates in connection with freight interchanged with the vessels of Seatrain Lines, Inc., and arose because the rates include compensation to the trunk lines for loading freight into or unloading freight from cars in interchanging with vessels, but the necessity for such loading or unloading is eliminated by Seatrain's type of ship and its patented crane and devices and because the terms of the agreement above quoted are not applicable to freight interchanged with Seatrain since cars are neither loaded or unloaded by Hoboken or at its expense nor are they loaded or unloaded by the shipper or consignee at their expense.

10. Seatrain Lines, Inc., is a water carrier operating a new type of ocean-going steamship vessel designed to save the labor and expense of loading, unloading, handling, and furnishing cars ordinarily devolving upon the railroads at the ports in connection with freight transported by them under their so-called shipside or lighterage-free rates in interchanging such freight with steamships, this saving to be accomplished by a special type ship and the use of patented inventions, by which the freight is transferred between

rail and vessel in the cars used for rail movement without breaking bulk or handling the freight itself. The transfer is accomplished by means of a large crane, located on the pier alongside which the vessel docks, a car being transferred by the crane between the hold of the vessel and the pier upon a so-called cradle, which fits into a well upon the pier so that the car can be pulled off or shoved on to the cradle by a small locomotive, the cradle also fitting into the hatch of the ship.

11. In 1932, Hoboken asked its trunk-line connections to pay it a division or allowance on Seatrain freight of $1.00 a ton, made up of 60¢ to reimburse it for its switching cost and 40¢ to reimburse it for its payment to Seatrain. The trunk-line railroads refused and paid it only 60¢ a ton on all Seatrain freight. When the contract was changed in 1937, Hoboken asked a division of $1.35 per ton only on freight moving on lighterage-free or shipside rates (60¢ plus 75¢), but the trunk-line railroads again refused and persisted in paying it only 60¢ per ton on all freight received from or delivered to Seatrain's vessels, although out of the same rates they paid Hoboken $1.35 on freight interchanged with the Holland-America Line, Pan-Atlantic Steamship Co., and other steamship lines.

12. Thereupon plaintiff filed its complaint with the Interstate Commerce Commission asking the Commission, under Section 15 of the Interstate

Commerce Act, to prescribe the just, reasonable, and equitable divisions to be received by it and by the trunk lines, respectively, out of the ship-side or lighterage-free rates to and from the Hoboken water front on freight interchanged with Seatrain. The trunk-line railroads were made defendants in the proceeding.

13. Hearings were held before an Examiner of the Interstate Commerce Commission on this complaint. The Commission's Examiner submitted a proposed report, to which exceptions were filed, after which there was oral argument before the Commission.

14. Under date of July 24, 1939, the Commission rendered its decision, in which it found that the division of 60c (as subsequently changed by percentage increases) paid by the trunk lines to Hoboken on Seatrain traffic was not unjust, unreasonably low, inequitable, or unduly prejudicial to Hoboken. Based thereon, the Commission entered its order of the same date dismissing the complaint.

15. Thereafter Hoboken filed with the Commission a petition for reconsideration, which the Commission by its order of April 1, 1940, denied.

16. In its decision the Commission found that Hoboken as a switching line was entitled to receive divisions which would reimburse it for its full costs of handling the freight interchanged with Seatrain, including a fair return on the value

of the property, but it concluded that 60¢ (with the subsequent percentage increases) represented such full cost and that the contract payments made to Seatrain were not a part of Hoboken's costs of handling the traffic.

17. As a further ground for its decision, the Commission found that the payments might be justified as a part of Hoboken's expense if they were "necessary for the purpose of inducing the establishment of the new method of transfer," but the Commission concluded that there was "no evidence, however, that payments were or are necessary for this purpose" and based this conclusion upon a finding that

> The contract between Seatrain and complainant, to which defendant rail lines are not parties, is not evidence to this effect, in view of the control which Seatrain exercises over complainant.

and the Commission further found:

> There is ample reason to conclude * * * that this plan has sufficient advantages to impel its use and promotion by Seatrain regardless of any contributory payments from rail connections.

18. Because of the corporate relation between Seatrain and Hoboken, Hoboken asked the Commission to consider and determine whether the payment of 73¢ (formerly 40¢) provided by the contract represented reasonable compensation for the benefits derived by Hoboken to be included in

the costs for which Hoboken was entitled to reimbursement from the trunk lines and if 73¢ was not reasonable, then to determine what would be reasonable and fair compensation in the light of efficient management and operation of Hoboken's properties. The Commission failed to make any finding on this question, finding, for the reasons above indicated, that no payment whatever to Seatrain could properly be included in Hoboken's costs, for which it should be reimbursed by the divisions to be received from the trunk lines.

CONCLUSIONS OF LAW

1. The Commission's order dismissing Hoboken's complaint, although in form a negative order, has the effect of requiring Hoboken to continue to perform its terminal service as a switching carrier for the trunk lines in transferring freight between the trunk lines and Seatrain for 60¢ per ton (with the subsequent percentage increases) and is therefore, in effect, an affirmative order which is subject to review in this proceeding. *Alton R. Co.* v. *United States,* 287 U. S. 229. Moreover, under *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, this court has jurisdiction regardless of the form of the Commission's order.

2. This court may not substitute its judgment for that of the Commission as to what would be reasonable divisions to be received by Hoboken or as to what would be reasonable compensation to be

paid by Hoboken to Seatrain and to be included in Hoboken's costs, for which it should be reimbursed by the divisions paid to it by the trunk lines. But if the Commission in rendering its decision committed errors of law or disregarded or refused to receive evidence because of an erroneous belief that the evidence was not material or if the Commission failed to make a finding required of it, without which a proper determination could not have been made by it, this court may enjoin and set aside the Commission's order dismissing the complaint and may direct the Commission to reconsider its decision and take further proceedings in the light of the conclusions herein stated.

3. The Commission erred as a matter of law in not making a finding as to whether or not reasonable payment to Seatrain for the benefits derived by Hoboken and through Hoboken by the trunk lines from the interchange with Seatrain and the use by Seatrain of its patented devices in connection therewith, is part of Hoboken's costs of operation under efficient operation in the transfer of freight between the trunk lines and Seatrain, when on such freight the trunk lines charge their lighterage-free or shipside rates, and have the obligations and undertakings for which they are compensated by such rates.

4. The Commission erred as a matter of law and failed to carry out the duty imposed upon it

by the statute, to give due consideration "to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property" in that the Commission failed to consider and make a finding as to whether relationship between Hoboken and Seatrain was in the interest of the efficient operation of Hoboken as a rail carrier, and failed to consider and make a finding as to what payment by Hoboken to Seatrain would be reasonable compensation, consistent with such efficient operation, for the benefits derived by Hoboken and the trunk lines from the interchange arrangement with Seatrain, to be included in Hoboken's costs for which it is entitled to be reimbursed by the divisions paid to Hoboken by the trunk lines.

5. The Commission erred as a matter of law and failed to carry out the duty imposed by the statute of determining whether or not the divisions were unjust, unreasonable, inequitable or "unduly preferential' or prejudicial as between the carriers * * *" in that the Commission failed to direct its attention to the problem of the equitable division of the 75c saving occasioned by the interconnection with Seatrain.

6. The order of the Commission dismissing Hoboken's complaint should be set aside and annulled and the Commission should be directed (a) to reconsider the decision; (b) to determine

whether or not the relationship between Hoboken and Seatrain is of value; (c) if the Commission should find that the relationship is of value, to determine the amount of that value to be allowed in establishing Hoboken's legitimate costs; (d) to make a finding as to whether or not the allowance to the trunk line carriers of the entire saving of 75¢ per ton occasioned by the use of the Seatrain interconnection is "unduly preferential or prejudicial as between the carriers"; and (e) if the Commission should find that the allowance of the entire 75¢ to the trunk line carriers is unduly preferential or prejudicial, to determine an equitable division of the 75¢.

JOHN BIGGS, JR.,
U. S. Circuit Judge.

GUY L. FAKE,
U. S. District Judge.

WILLIAM F. SMITH,
U. S. District Judge.

NOVEMBER 24th, 1942.

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